

Message Text

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TO AMEMBASSY BONN

INFO SECDEF

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C O N F I D E N T I A L STATE 301112

E.O. 11652:GDS

TAGS:MARR, MNUC, GW

SUBJECT: NUCLEAR POWERED WARSHIP (NPW) VISITS TO FRG

REF: A. BONN 14342 (DTG 271547Z AUG 76), B. BONN 04140

(DTG 111A197 M;R 76),C. BONN 07308 (DTG 301727Z APR 76),

D. SYATE AIRGRAM A-292 DATED JANUARY 16, 1975,

E. BONN 18168 (DTG 281253Z OCT 76)

1. SUMMARY. THIS MESSAGE REVIEWS LIABILITY ASSURANCE CON-
SIDERATIONS APPLICABLE TO NPW AND NUCLEAR POWERED MERCHANT
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SHIPS, AND PROVIDES BASIS FOR EMBASSY TO RESPOND TO QUES-
TIONS RAISED IN REFTEL A. END SUMMARY.

2. AS REPORTED REFTEL B, IN MARCH 1976 EMBASSY FORMALLY

DELIVERED TO FRG FONOFF DEPUTY ASSISTANT SECRETARY RUHFUS A COPY OF PL 93-513 AND JOINT CONGRESSIONAL COMMITTEE REPORT THEREON. RUHFUS UNDERSTOOD SIGNIFICANCE OF THE PROBLEM AND RESPONDED POSITIVELY TO THE DEMARCHE MADE BY EMBOFF. FROM REFTELS A AND C IT WOULD APPEAR FRG MINISTER OF INTERIOR HAS MADE NO PROGRESS IN RESOLVING LIABILITY ASSURANCE ISSUE BETWEEN FEDERAL AND STATE GOVERNMENTS. AS WE VIEW REFTEL A, FRG HAS TWO CONCERNS: (A) IT DOES NOT PERCEIVE AN IRREVOCABLE USG COMMITMENT (CONTRACTUAL GUARANTEE) TO ASSUME LIABILITY FOR CLAIMS ARISING FROM

DAMAGES RESULTING FROM A NUCLEAR REACTOR INCIDENT INVOLVING A U.S. NPW; (B) FEDERAL GOVERNMENT IS AS YET UNABLE TO RESOLVE THE CONSTITUTIONAL ISSUE BETWEEN IT AND THE STATE GOVERNMENTS REGARDING THE NECESSITY FOR ACTUAL APPROPRIATED FUNDS OR SURETY BOND TO COVER DAMAGES ARISING FROM AN NPW REACTOR INCIDENT. THUS FRG MUST CONTINUE TO OBLIGATE FUNDS FROM DEFENSE APPROPRIATION FOR CLAIMS PAYMENT TO SATISFY STATE REQUIREMENTS BEFORE APPROVING NPW VISITS.

3. WE CANNOT ACCEPT SUGGESTION BY DR. RUMPF OF LEGAL DIVISION FRG FONOFF IN PARA 3 OF REFTEL A REGARDING THIRD PARTY LIABILITY CLAIMS OF ARTICLE VIII, NATO SOFA. OUR VIEWS ARE AS FOLLOWS:

A. RUMPF'S INTERPRETATION APPEARS TO BE INTENDED TO ASSURE CLAIMS COULD BE HANDLED BY FRG UNDER THIRD PARTY LIABILITY ACTIONS CONSISTENT WITH ARTICLE VIII, AND THAT USG WOULD THEN HAVE A LEGAL OBLIGATION TO REIMBURSE FRG ACCORDING TO COST SHARING ARRANGMENTS. FYI. WE DO NOT AGREE WITH THE EMBASSY INTERPRETATION OF PARA 3. IN OUR VIEW, THE FRG PROPOSAL DOES NOT REMOVE THIRD PARTY CLAIMS FOR DAMAGES RESULTING FROM AN NPW REACTOR INCIDENT FROM THOSE CLAIMS TO BE DEALT WITH BY THE FRG. END FYI

B. IT WOULD BE UNWISE TO ENTER INTO SUCH AN AGREED INTERPRETATION WITHOUT CONSULTING OTHER PARTIES TO THE SOFA. CONFIDENTIAL

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C. UNDER PARAGRAPH 5 IT IS CLEAR TO US THAT A SHIPBOARD CASUALTY, INCLUDING A NUCLEAR REACTOR INCIDENT, IS AN EVENT RELATED TO OPERATION OF A SHIP.

D. AS A MATTER OF FIRM POLICY, WE HAVE NOT ACCEPTED PROVISIONS IN BILATERAL OR MULTILATERAL AGREEMENTS WITH OUR ALLIES WHICH DIFFERENTIATE BETWEEN NUCLEAR POWERED AND CONVENTIONALLY POWERED WARSHIPS. THIS POLICY AVOIDS ARBITRARILY FRAGMENTING NORMAL SHIP OPERATIONS BETWEEN ALLIED COUNTRIES. FRG PROPOSAL, IF OTHERWISE FEASIBLE, WOULD SET UNDESIRABLE PRECEDENT WHICH COULD LEAD TO DEMANDS BY OTHERS THAT SPECIAL INTERPRETATION OR CONDITIONS BE SET UP FOR DIFFERENT SHIP TYPES.

E. EVEN IF U.S. AGREED TO FRG PROPOSAL IN HANDLING THIRD PARTY CLAIMS UNDER ARTICLE VIII, REQUIRED PROOF OF NEGLIGENCE AND COST SHARING PROVISIONS WOULD MEAN THAT NEITHER ABSOLUTE NOR UNLIMITED LIABILITY ON THE PART OF U.S. WOULD BE REALIZED. OUR EXPERIENCE IN DEALING WITH OTHER COUNTRIES INDICATES THEY DO NOT CONSIDER THIS

AVENUE AS AN ACCEPTABLE ALTERNATIVE BECAUSE OF THESE CONSIDERATIONS. IN OUR OPINION, THEREFORE, THE PROPOSED FRG INTERPRETATION WOULD NOT RECEIVE FAVORABLE CONSIDERATION BY OTHER ALLIED COUNTRIES. PROCEDURE FAR PREFERABLE TO MOST COUNTRIES IS TO COME DIRECTLY TO THE U.S. FOR SUCH CLAIMS WHERE U.S. IS COMMITTED TO SETTLEMENT ON THE BASIS OF ABSOLUTE LIABILITY WITH NO UPPER INDEMNITY LIMIT AND NO COST SHARING (PURSUANT TO PROVISIONS OF PL 93-513)).

4. WE CONSIDER THAT RUMPF'S DISCUSSION OF ASSURANCES REQUIRED FOR MERCHANT SHIPS WAS A FURTHER EFFORT TO ALLEVIATE FEDERAL GOVERNMENT'S COMMITMENT TO OBLIGATE APPROPRIATED FEDERAL FUNDS FOR STATE GOVERNMENT USE IN CLAIMS SETTLEMENT IF REQUIRED. IT DOES NOT PROPERLY DISTINGUISH BETWEEN LIABILITY STATUS OF WARSHIPS AND MERCHANT SHIPS, AND WAS APPARENTLY BASED ON A MISUNDERSTANDING OF THE USG LIABILITY ASSURANCE REQUIREMENTS APPLIED TO "OTTO HAHN". TO BETTER UNDERSTAND THE ISSUES INVOLVED IN THIS SUGGESTION, A BRIEF REVIEW OF THE HISTORY OF NUCLEAR CONFIDENTIAL

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MERCHANT SHIP OPERATION IS PROVIDED:

A. THE U.S. MERCHANT SHIP NS SAVANNAH WAS THE WORLD'S FIRST NUCLEAR POWERED MERCHANT SHIP. IN 1968 THE ATOMIC ENERGY ACT WAS AMENDED TO PROVIDE A 500 MILLION DOLLAR INDEMNITY GUARANTEE FOR A NUCLEAR INCIDENT INVOLVING NS SAVANNAH AS AN EXTENSION OF THE EXISTING 500 MILLION DOLLAR INDEMNITY THAT WAS ALREADY IN THE ACT TO PROVIDE INCENTIVE AND NUCLEAR INCIDENT COVERAGE FOR OTHER TYPES OF U.S. NUCLEAR FACILITIES TO BE BUILT, OWNED OR OPERATED BY COMMERCIAL LICENSEES. PURPOSE OF THE SAVANNAH AMENDMENT WAS TO ESTABLISH, IN EFFECT, INCIDENT LIABILITY ASSURANCES FOR A NUCLEAR POWERED MERCHANT VESSEL IN COMMERCIAL SERVICE TO HELP PROMOTE WORLDWIDE ACCEPTANCE OF THIS PEACEFUL USE OF THE ATOM.

B. IT IS A UNIVERSALLY ACCEPTED RULE OF INTERNATIONAL LAW THAT WARSHIPS, WHETHER CONVENTIONALLY OR NUCLEAR POWERED, REMAIN UNDER THE EXCLUSIVE JURISDICTION OF THEIR FLAG STATE UNDER THE DOCTRINE OF "SOVEREIGN IMMUNITY." AS SOVEREIGN REPRESENTATIVES, OWNED, OPERATED, AND BACKED BY THE FULL FINANCIAL RESOURCES OF THEIR GOVERNMENT (WHICH STANDS AS A SELF-INSURER), THEY DO NOT CARRY COMMERCIAL

INSURANCE. THE STATUS OF COMMERCIAL SHIPS, ON THE OTHER HAND, IS QUITE DIFFERENT. UNDER THE RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY, TO WHICH THE USG SUBSCRIBES, SHIPS OWNED AND OPERATED BY A SOVEREIGN GOVERNMENT THAT ARE ENGAGED ENTIRELY IN COMMERCIAL SERVICE ARE, UNLIKE WARSHIPS, NOT ENTITLED TO SOVEREIGN IMMUNITY. THUS THE USG,

TO FACILITATE THE ACCESS TO FOREIGN PORTS OF THE U.S. MERCHANTMAN NS SAVANNAH, OBTAINED LEGISLATION PROVIDING FOR THIS 500 MILLION DOLLAR INDEMNITY GUARANTEE FOR A NUCLEAR INCIDENT INVOLVING THAT SHIP, AND ENTERED INTO BILATERAL AGREEMENTS WITH SEVERAL COUNTRIES, INCLUDING FRG, SPAIN, DENMARK AND PORTUGAL. THOSE AGREEMENTS PROVIDED, INTER ALIA, FOR INSPECTION BY AND TRANSMISSION OF TECHNICAL DATA AND SAFETY ASSESSMENTS TO HOST GOVERNMENTS, AND FOR WAIVER OF SUCH IMMUNITY FROM LOCAL JURISDICTION AS MIGHT EXIST. THE ENTIRE BILATERAL APPROACH AND INDEMNITY/LIABILITY PROVISIONS FOLLOWED FOR SAVANNAH WERE CONFIDENTIAL

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DICTATED BY THE COMMERCIAL NATURE OF THAT SHIP. WE HAVE STEADFASTLY RESISTED FOREIGN ATTEMPTS TO TREAT NUCLEAR POWERED MERCHANT SHIPS AND NPW THE SAME IN ALL RESPECTS SINCE THIS WOULD WEAKEN THE TRADITIONAL DISTINCTION IN INTERNATIONAL LAW BETWEEN THESE TWO CATEGORIES OF SHIPS. U.S. POLICY IS THAT NPW BE TREATED LIKE OTHER WARSHIPS EXCEPT FOR

(1) SOME ADMINISTRATIVE DIFFERENCES IN THE WAY VISIT REQUESTS ARE HANDLED,

(2) UNILATERAL PRESENTATION OF THE U.S. STANDARD STATEMENT OF ASSURANCES ON NPW OPERATIONS, AND

(3) AMPLIFICATION OF PARA 3 ASSURANCE OF STANDARD STATEMENT, AS CONTAINED IN PL 93-513, THAT USG WILL SETTLE ALL CLAIMS RESULTING FROM AN NPW REACTOR INCIDENT ON THE BASIS OF ABSOLUTE LIABILITY.

C. WITH RESPECT TO THE FRG NUCLEAR MERCHANT SHIP OTTO HAHN, THE FRG FIRST APPROACHED USG IN 1971 WITH REGARD TO PASSAGE OF OTTO HAHN THROUGH THE PANAMA CANAL. CONSIDERABLE US INTERAGENCY DELIBERATION ON THIS MATTER TOOK PLACE, FOCUSING ON THE LEGAL IMPLICATIONS OF THE U.S. ATOMIC ENERGY ACT AND THE HAY-PAUNCEFOTE TREATY, WHICH DEALS WITH PASSAGE THROUGH THE PANAMA CANAL. IN LIGHT OF THE COMMERCIAL CHARACTER OF THE NS OTTO HAHN, IT WAS DECIDED THAT INDEMNITY PROTECTION FOR THE U.S. PUBLIC WAS NECESSARY. ACCORDINGLY, IN EXPLORATORY DISCUSSIONS WITH THE FRG, THE USG, IN A NOTE VERBALE OCTOBER 17, 1972, STATED, INTER ALIA, THAT THE USG CONSIDERED "THE OPERATORS OF THE NS OTTO HAHN SHOULD BE PREPARED TO PRO-

VIDE, IN AN AGREEMENT, INDEMNITY ASSURANCE FOR DAMAGE ARISING OUT OF A NUCLEAR INCIDENT IN THE COURSE OF THIS PROPOSED VISIT, IN THE AMOUNT WHICH PREVAILS AT THE PRESENT TIME WITH RESPECT TO UNITED STATES CIVIL LANDBASED AND MERCHANT SHIP REACTORS, THAT IS, AT LEAST 500 MILLION DOLLARS." THIS AMOUNT WAS IDENTICAL TO THAT SPECIFIED

IN THE ATOMIC ENERGY ACT FOR U.S. NON-GOVERNMENTAL NUCLEAR ACTIVITIES, AND, BY AMENDMENT TO THE ACT, NS
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SAVANNAH. THE AGREEMENT OF INDEMNITY DOES NOT, HOWEVER, REQUIRE ESTABLISHING A BOND IN THAT AMOUNT WITH THE CONSEQUENT ALLOCATION OF FUNDS FROM EXISTING RESOURCES. THE GUARANTEE WOULD ONLY HAVE TO ASSURE THAT THE FUNDS UP TO THE SPECIFIED AMOUNT WOULD BE MADE AVAILABLE IN THE EVENT OF A NUCLEAR INCIDENT INVOLVING THE SHIP.

D. AS NOTED ABOVE, THE U.S. DOES NOT TREAT NUCLEAR WARSHIP ACCESS IN THE SAME MANNER AS COMMERCIAL NUCLEAR SHIPS. NUCLEAR WARSHIP ENTRY IS BASED ON A DETERMINATION BY THE EXECUTIVE BRANCH AS TO WHAT CONDITIONS, IF ANY, ARE REQUIRED CONSISTENT WITH THE PRESIDENT'S RESPONSIBILITIES TO CONDUCT FOREIGN AFFAIRS AND TO PROVIDE FOR THE DEFENSE OF THE COUNTRY. TO DATE THE ONLY FOREIGN NUCLEAR POWERED WARSHIPS THAT HAVE SOUGHT AND BEEN GRANTED ACCESS TO THE UNITED STATES ARE THOSE FROM THE UNITED KINGDOM. THE U.S. HAS ALLOWED SUCH ACCESS ON THE SAME BASIS AS WE SEEK ACCESS TO OTHER COUNTRIES - RECEIPT OF A STATEMENT OF ASSURANCES ON OPERATION AND SAFETY OF THE WARSHIPS COUPLED WITH A DEMONSTRATED RECORD OF SAFE OPERATION. (THE UK HAS A "STANDARD STATEMENT" THAT IS VIRTUALLY IDENTICAL TO THE ONE WE USE. NO OTHER INDEMNITY/LIABILITY GUARANTEE HAS BEEN SOUGHT THOUGH UK HAS ENACTED A PROVISION SIMILAR TO OUR PL 93-513.) WE CONSIDER OUR MUTUAL DEFENSE INTERESTS AND THE INTEGRITY OF HMG SUFFICIENT GUARANTEES TO COVER NPW REACTOR INCIDENT CLAIMS IN THE EXTREMELY UNLIKELY EVENT SUCH AN INCIDENT EVER OCCURRED.

E. IT SHOULD BE CLEAR FROM THIS REVIEW OF THE MERCHANT SHIP SITUATION THAT THERE IS NO PRECEDENT OR PARALLEL BETWEEN THE ASSURANCES REQUIRED OR PROVIDED FOR NUCLEAR POWERED MERCHANT SHIPS AND THOSE FOR NPW, AND THAT ASSURANCES FOR NS SAVANNAH DID NOT INVOLVE ALLOCATION OR OBLIGATION OF EXISTING FUNDS.

5. TO ASSIST FRG IN ELIMINATING CONCERN OVER U.S. OBLIGATION TO SETTLE CLAIMS USING PL 93-513 AND AS SUGGESTED IN REFTEL E, EMBASSY IS AUTHORIZED TO DELIVER A COPY TO FRG OF EXECUTIVE ORDER 11918, WHICH IMPLEMENTS PL 93-513 AND ESTABLISHES AUTHORITY OF SECRETARY OF DEFENSE TO SETTLE CLAIMS USING CONTINGENCY FUNDS, AS AVAILABLE, AND

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TO OBTAIN SUCH ADDITIONAL FUNDS AS NEEDED THROUGH CONGRESSIONAL APPROPRIATION. (COPIES OF THE EXECUTIVE ORDER ARE BEING POUCHED SEPARATELY.) REFTEL E NOTED "SECDEF DISCRETION" AND NEED FOR CONGRESSIONAL APPROPRIATION OF ADDITIONAL FUNDS, IF REQUIRED, COULD BE POTENTIAL PROBLEMS AFFECTING FRG ACCEPTANCE OF THE EXECUTIVE ORDER

AS A FURTHER SUBSTANTIVE ASSURANCE OF U.S. COMMITMENT. REFTEL E QUESTIONED THE AMOUNT OF THE SECDEF CONTINGENCY FUNDS, TO DETERMINE IF IT IS LARGE ENOUGH TO COVER DM 500 MILLION LAENDER LIABILITY BOND OR ANY POTENTIAL CLAIM FROM A NUCLEAR INCIDENT. CONTINGENCY FUNDS ARE APPROPRIATED EACH YEAR FOR DOD TO DEAL WITH MINOR CLAIMS, AND COULD BE USED FOR NUCLEAR REACTOR INCIDENTS OR ANY OTHER PROPER CLAIM. HOWEVER, THE AMOUNT OF THESE FUNDS DOES NOT APPROACH THE DM 500 MILLION FIGURE AND IS NOT PREDICATED ON ESTABLISHING AN ABILITY TO PAY LARGE CLAIMS. THUS, EMPHASIS ON THE DOD CONTINGENCY FUND IN DISCUSSIONS WITH FRG WOULD BE OF LITTLE VALUE. THE ASSURANCES OF PL 93-513 EXPRESSED THE WILL OF CONGRESS, AS DISCUSSED IN JCAE REPORT ON THE BILL PREVIOUSLY PROVIDED, AND WAS FURTHER STRENGTHENED BY EXECUTIVE ORDER 11918 IMPLEMENTATION WITHIN U.S. EXECUTIVE BRANCH. THIS IS AN EXTREMELY STRONG COMMITMENT ON THE PART OF THE USG. IT WOULD BE INCONCEIVABLE FOR THE U.S. TO RENEGE ON THIS COMMITMENT WITHOUT JEOPARDIZING OUR WARSHIP OPERATION THROUGHOUT THE WORLD AND INDEED WITHOUT UNDERMINING THE INTEGRITY OF OUR FOREIGN RELATIONS. IT SHOULD BE RECOGNIZED THAT FOREIGN CLAIMS SETTLEMENTS, UNDER BILATERAL AND MULTILATERAL AGREEMENTS, SUCH AS SOFA, OFTEN REQUIRE SUPPLEMENTAL APPROPRIATION OF FUNDS TO PAY APPROVED CLAIMS. CONGRESSIONAL APPROPRIATION OF FUNDS TO SUPPLEMENT THE SECDEF CONTINGENCY FUNDS SHOULD BE VIEWED NO DIFFERENTLY.

6. THE ALTERNATIVE PROPOSED IN PARA 5 REFTEL B IS UNNECESSARY IN VIEW OF THE UNILATERAL ASSURANCE BY THE USG IN PL 93-513 WITH RESPECT TO ABSOLUTE LIABILITY FOR DAMAGE CLAIMS ATTRIBUTABLE TO A NUCLEAR REACTOR INCIDENT INVOLVING THE REACTOR OF A U.S. NPW. WE DO NOT DESIRE TO INCLUDE A STATEMENT REGARDING LIABILITY IN EACH VISIT NOTIFICATION SUBMITTED TO FRG. IF THE TEXT OF
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AIDE MEMOIRE TO FRG, REPORTED IN REFTEL B, WERE SIMILAR TO TEXT OF TAB A REFTEL D, IT WOULD APPEAR THIS WOULD SATISFY FRG NEEDS, PARTICULARLY IF WORDS "THE PROVISIONS OF THIS LEGISLATION (PL 93-513) ARE IN EFFECT FOR ALL U.S. NPW ENTERING PORTS IN FRG" WERE INCLUDED.

7. DRAWING ON THE ABOVE, EMBASSY SHOULD RESPOND TO ISSUES
RAISED BY RUMPF. IF THE WORDS QUOTED IN PARA 6 ABOVE
WERE NOT INCLUDED IN THE MARCH 1976 AIDE MEMOIRE, EMBASSY
SHOULD DETERMINE IF PROVIDING SUCH A U'ILATE,AL STATEMENT
IN A NOTE DURING THESE DISCUSSIONS WOULD RESOLVE THIS
ISSUE. DEPARTMENT WOULD APPRECIATE A COPY OF THE MARCH
1976 AIDE MEMOIRE. DEPARTMENT APPROVAL SHOULD BE OBTAINED
FOR ANY PROPOSED NOTE TO BE DELIVERED TO FRG IN RESPONSE
TO REFTELS A AND E. ROBINSON

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